Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JALANA HUDSON, PETITIONER

V.

STATE OF GEORGIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Please Serve:

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QUESTION PRESENTED:

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BARS RETRIAL WHEN A DEFENDANT IS ACQUITTED BASED UPON INSUFFICIENT EVIDENCE OF VENUE.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court Of Appeals.

OPINIONS BELOW

The opinion of the Georgia Court Of Appeals is reported as *Hudson v. State*, A09A0367. A copy of this opinion is attached as Appendix "A," to this petition.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on March 19, 2009. This court has jurisdiction pursuant to United States Supreme Court Rules 12&13, over this matter as it is an appeal from the denial of the Georgia Supreme Court to exercise discretionary review of a holding of the Georgia Court of Appeals. The Georgia Supreme Court entered its order on June 30, 2009. The current Chief Judge of the Georgia Supreme Court, Carol Hunstein, dissented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

The Geogia Constitution of 1983, Article VI, Section II, Paragraph VI provides in pertinent part:

> ... all criminal cases shall be tried in the county where the crime was committed ...

STATEMENT

The Petitioner waived her right to a jury trial and proceeded to trial on April 3, 2008 before Judge Joel Dodson who was

sitting for Judge W. O'Neal Dettmering. At the conclusion of the State's case the Petitioner moved for an acquittal based upon several grounds including the State's failure to prove venue. The case was continued in order for Judge Dodson to review the transcript. (T. 57)

On April 17, 2008, Judge Dodson after reviewing the transcript, ruled that the State did not prove venue beyond a reasonable doubt and acquitted the Petitioner. (T-33, lines 6-7).

The State had the Petitioner's case placed upon another trial calendar, this time before Judge Dettmering.

The Petitioner filed a plea in bar to this subsequent prosecution citing as authority for the plea, the Double Jeopardy Clause of the Fifth Amendment. (R. 52).

On August 6, 2008, Judge Dettmering heard the arguments of both sides and denied the Petitioner's plea. (R. 65)

On March 19, 2009, the Georgia Court of Appeals affirmed Judge Dettmering's order and the Georgia Supreme Court refused to exercise its discretion to review the matter on June 30, 2009.

REASON FOR GRANTING THE WRIT:

The standard used by state courts of last resort to determine whether a retrial is barred by the Fifth Amendment when a defendant is acquitted based upon insufficient evidence of venue, vary, and in states, such as Georgia where venue is considered a fundamental right, allowing retrial violates the Double Jeopardy clause.

In Georgia, Tennessee, Washington and Mississippi, an acquittal based upon failure to prove venue does not bar a retrial, while in Ohio, Indiana and Kentucky, a retrial is barred.

The Tennessee Supreme Court in *State v. Hutcherson*, 1990 TN 863, 790 S.W. 2d 532 (1990), granted the State's appeal to determine whether the Tennessee Court of Criminal Appeals erred by ruling that the defendant could not be retried after he was acquitted based upon the prosecution's failure to prove venue.

The Court reversed the Court of Appeals, and held that retrial was not barred because "it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any

defect sufficient to constitute reversible error in the proceedings leading to conviction."

Similarly, in Washington, the Court in *State v. Johnson*, 45 Wn App. 794, 727 P. 2d 693, (1986), ruled that the trial judge's dismissal of second degree rape charges against Albert Wayne Johnson because the State failed to prove essentially venue did not bar retrial because venue is unrelated to factual guilt or innocence.

In *Fabian v. State*, 284 So. 2d 55 (1949), the Mississippi Supreme Court, in addition to ruling that retrial was not barred also held that the jury should have be given special jury instructions. "This case points up the problem of properly instructing a jury when the defense is lack of venue. In such cases, the jury should be instructed to find the defendant not guilty for lack of venue if it finds the venue is in another county or state. An acquittal solely on the ground of lack of venue would not constitute double jeopardy and bar prosecution in the county having venue."

Contrary to the Tennessee, Washington and Mississippi position that a retrial is not barred by the Fifth Amendment because an acquittal based upon insufficient evidence of venue is unrelated to guilt or innocence, in

Ohio, where the defendant was found guilty on all counts, the Court in *State v. Shaw*, 134 Ohio App. 3d 316, 730 N. E. 2d 1075 (1999), ruled that the trial court committed prejudicial error in overruling the Appellant's motion to dismiss for failure to establish venue and held that the Appellant was discharged. Similarly, in Kentucky, the Court in *Hermansen v. Commonwealth*, 2009-KY-0323.131 (2009), ordered that the Appellant be acquitted based upon the State's failure to prove venue.

The case most factually similar to the case at hand is *Elkins v. State*, 745 N.E. 2d 643 (2001), where the Indiana Court of Appeals found that jeopardy attached when the trial judge granted the defendant's motion for a directed verdict because "a judgment on the evidence entered pursuant to a defendant's motion on the grounds that the State had failed to prove venue is an acquittal. A judgment of acquittal, even where it is based upon an egregiously erroneous foundation, stops the retrial of the defendant."

There is apparently no sound legal rationale for one state to rule that the Fifth Amendment bars retrial and another that it doesn't save the notion that it, venue, is

considered a fundamental right in one state and not in another.

In the instant case, the Georgia Court of Appeals reasoned that venue was not sufficiently essential to guilt or innocence so that it could be deemed a right much less fundamental.

This reasoning, however, contravenes the very basis for the Court declaring, in the case at hand, that venue "... is an essential element in proving that one is guilty of the crime charged, which like every other material allegation in the indictment ... must be proved by the prosecution beyond a reasonable doubt."

The rationale for using this heightened standard of proof, i.e., "beyond a reasonable" as opposed to "preponderance of the evidence" is that venue in Georgia is a fundamental right. No other conclusion can be drawn here.

Though Georgia refuses to follow its own reasoning to a logical conclusion, California examining the same rationale as did the Georgia Court in the case at hand reached a different conclusion.

In *People v. Betts*, 102 Cal.App.4th 922, 126 Cal.Rptr.2d 64 (Cal.App. Dist.4 10/08/2002), the California Court of Appeals

found that states such as Georgia require a heightened standard of proof because "they reason that this issue involves a vital fundamental right. Subject matter jurisdiction relates to the very authority of the tribunal because, without it, the case cannot proceed and the judgment cannot be enforced. Thus, they reason that employing the highest standard of proof on this issue insures that when a court acts, it does so with authority."

The Court went on to distinguish California as well as other States in the minority who do not hold that venue is a fundamental right, and therefore do not require proof of it beyond a reasonable doubt. "... unlike these states, subject matter jurisdiction is required to be proven only by a preponderance of the evidence in California, not beyond reasonable doubt ... California criminal statutes do not define subject matter jurisdiction as an element of a crime... [location of the crime is not an essential element of a charged offense in case where venue challenged].)" *See also State v. Lingar*, 726 S.W.2d 728, 732 (Mo. banc 1987), cert. denied, 484 U.S. 872, 98 L. Ed. 2d 157, 108 S. Ct. 206 (1987)("The right to proper venue is guaranteed by the

Missouri Constitution, Article I, Section 18(a). Venue must be proved but it is not an integral part of the offense and thus need not be proven beyond a reasonable doubt ...").

Even if the decision to allow a retrial did not violate the Double Jeopardy clause because venue is unrelated to guilt or innocence, a retrial should nevertheless have been barred based upon the doctrine of collateral estoppel.

Under the doctrine of collateral estoppel an issue of ultimate fact, once resolved against the state by a final judgment may not again be litigated between the parties." *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970)(The Fifth Amendment guarantee against double jeopardy ... embodies collateral estoppel as a constitutional requirement. "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been

an established rule of federal criminal law at least since this court's decision more than 50 years ago ...").

The Georgia Court of Appeals reasoned that the collateral estoppel doctrine did not apply because the Petitioner's acquittal was not based on an issue that related to guilt or innocence. This reasoning is flawed because the purpose of the doctrine is to prevent endless litigation of an issue that two parties have had an equal opportunity to litigate. *Simmons v. State*, 276 Ga. 525 (2003)(The doctrine of collateral estoppel, also known as issue preclusion, prevents the re-litigation of an issue actually litigated and adjudicated on the merits between the same parties.).

CONCLUSION

For all of the reasons stated above Petitioner moves this Court to grant this petition and reverse the decision of the Georgia Court Of Appeals.

Respectfully submitted

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APPENDIX "A"

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COURT OF APPEALS OF GEORGIA

A09A0367, HUDSON V. STATE
March 30, 2009

BLACKBURN, Presiding Judge.

At her bench trial on charges of driving under the influence of alcohol per se,(fn1) driving without taillights,(fn2) failure to maintain her lane,(fn3) and misdemeanor obstruction of an officer,(fn4) Jalana Hudson successfully moved for directed verdict on the ground that the State failed to prove venue. She appeals the denial of her plea of former jeopardy, arguing that retrial is barred by the Fifth Amendment to the United States Constitution and OCGA § 16-1-8. For the reasons set forth below, we affirm.

"The appellate standard of review of a grant or denial of a double jeopardy plea in bar is whether, after reviewing the trial court's oral and written rulings as a whole, the trial court's findings supports its conclusion." (Punctuation omitted.) *Leonard v. State*.(fn5) Here, the record shows that Hudson was charged by accusation with driving under the influence of alcohol (DUI) per se, driving without taillights, failure to maintain her lane, and misdemeanor obstruction of an officer. Thereafter, she waived her right to a jury and proceeded with a bench trial.

At trial, a sheriff's deputy testified that on the evening of January 18, 2006, he stopped a

vehicle driven by Hudson after he had observed it operating without taillights and weaving in and out of its lane of travel. Upon asking Hudson for her driver's license, the deputy smelled an alcoholic beverage odor and noticed that Hudson's speech was slurred. The deputy further testified that after Hudson failed several field sobriety tests and an alco-sensor test, he arrested her for DUI. However, as he attempted to handcuff Hudson, she resisted and tried to get back into her vehicle. After the deputy subdued Hudson, she agreed to submit to the State-administered chemical test of her breath. The deputy testified that Hudson's first breath sample indicated an alcohol concentration of 0.138 grams, and her second sample showed a concentration of 0.135 grams.

At the close of the State's evidence, Hudson moved for a directed verdict on the grounds that the State had failed to prove both venue and the elements of DUI per se beyond a reasonable doubt. The trial court denied Hudson's motion for directed verdict as to the DUI per se charge but reserved ruling on whether the State had proven venue until the court could review the transcript. A few days later, following the court's review of the transcript and argument by both the State and Hudson, the court granted Hudson's motion for directed verdict on the ground that the State had failed to prove venue. After the State indicated that it would seek a retrial, Hudson filed a plea in bar on the ground

of former jeopardy. The trial court held a hearing on the issue, after which it denied Hudson's plea. Hudson filed a notice of appeal in the Supreme Court of Georgia, which found that her appeal failed to raise issues invoking its jurisdiction and ordered the case transferred to this Court.

1. Hudson contends that the trial court erred in denying her plea of former jeopardy, arguing that because the court directed a verdict on the ground that the State failed to prove venue in the first trial, retrial is barred by the proscription against double jeopardy found in the Fifth Amendment to the United States Constitution. We disagree.

The Georgia Constitution requires that venue in all criminal cases must be laid in the county in which the crime was allegedly committed. Ga. Const. of 1983, Art. VI, Sec. II, Par. VI. See also OCGA § 17-2-2. "Venue is a jurisdictional fact, and is an essential element in proving that one is guilty of the crime charged. Like every other material allegation in the indictment, venue must be proved by the prosecution beyond a reasonable doubt." (Footnotes and punctuation omitted.) *Jones v. State.*(fn6) The State's failure to prove venue beyond a reasonable doubt renders a verdict contrary to law. Id. at 901-902 (2). However, "[q]uestions of sufficiency of the evidence under the standard of *Jackson v. Virginia*(fn7) [ ] and whether the State has met

its burden to prove venue, are separate." *Grier v. State.*(fn8) See *Bradley v. State.*(fn9)

In *Burks v. United States,*(fn10) the United States Supreme Court held that when a conviction is reversed due to insufficient evidence, the defendant cannot be retried without violating the Double Jeopardy Clause of the United States Constitution. But in that same decision, the Supreme Court also distinguished between reversals based on procedural errors and reversals based upon insufficient evidence to prove guilt beyond a reasonable doubt, stating that "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant." Id. at 15 (III). "Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused." (Punctuation omitted.) *Jones,* supra, 272 Ga. at 904 (4). Thus, "a failure to properly establish venue does not bar retrial, because evidence of venue does not go to the guilt or innocence of the accused, and hence it does not invoke double jeopardy concerns." Id.

Hudson further contends that the doctrine of collateral estoppel bars retrial of her case. Specifically, she argues that because the trial court ruled to allow the retrial of a case in which

it had previously directed a verdict as to venue, the State is impermissibly being allowed to re-litigate an issue of ultimate fact that has already been determined in her favor. This argument is belied by our own Supreme Court's and the U.S. Supreme Court's determination (as previously noted) that venue is a procedural matter and does not bear on the ultimate issue of a defendant's guilt or innocence. See *Burks*, supra, 437 U.S. at 15 (III); *Jones*, supra, 272 Ga. at 904 (4). Accordingly, the trial court did not err in denying Hudson's plea of former jeopardy on the ground that retrial is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. See *Grier*, supra, 275 Ga. at 431 (1); *Jones*, supra, 272 Ga. at 905 (4).

2. Hudson also contends that the trial court erred in denying her plea of former jeopardy, arguing that she was acquitted after the first trial and thus retrial is barred by OCGA § 16-1-8 (a) (1). Again, we disagree.

"OCGA § 16-1-8 provides expanded protection to criminal defendants facing retrial, beyond that provided by the constitutional bars to double jeopardy." *Grier*, supra, 275 Ga. at 431 (2). Subsection (a) (1) of that statute provides: "A prosecution is barred if the accused was formerly prosecuted for the same crime based upon the same material facts, if such former prosecution[] [r]esulted in either a conviction or

an acquittal. . . ." However, subsection (d) (1) of the statute provides: "A prosecution is not barred within the meaning of this Code section if[] [t]he former prosecution was before a court which lacked jurisdiction over the accused or the crime. . . ." "A court in which venue is not proved does not have jurisdiction over the crime." *Grier,* supra, 275 Ga. at 432 (2). "Where venue is not established by the [S]tate, any ensuing judgment is void, although reversal of a conviction on this basis does not prevent retrial in a court where venue is proper and proven." (Punctuation omitted.) Id. See *Trogdon v. State.*(fn11)

Here, the State failed to establish venue, and thus the trial court did not have jurisdiction over Hudson's case. Thus, under OCGA § 16-8-1 (d) (1), the State is not barred from retrying this matter and attempting to prove that venue is proper in this trial court. See *Grier,* supra, 275 Ga. at 432 (2). Accordingly, the trial court did not err in denying Hudson's plea of former jeopardy. Judgment affirmed.

Adams and Doyle, JJ., concur.

Footnotes:

FN1. OCGA § 40-6-391 (a) (5).

FN2. OCGA § 40-8-23 (b).

FN3. OCGA § 40-6-48 (1).

FN4. OCGA § 16-10-24 (a).

FN5. *Leonard v. State*, 275 Ga. App. 667-668 (621 SE2d 599) (2005).

FN6. *Jones v. State*, 272 Ga. 900, 901 (2) (537 SE2d 80) (2000).

FN7. *Jackson v. Virginia*, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

FN8. *Grier v. State*, 275 Ga. 430, 431 (1) (569 SE2d 837) (2002).

FN9. *Bradley v. State*, 272 Ga. 740, 741 (1), (2) (533 SE2d 727) (2000).

FN10. *Burks v. United States*, 437 U.S. 1, 11 (III) (98 SC 2141, 57 LE2d 1) (1978).

FN11. *Trogdon v. State*, 176 Ga. App. 246, 247 (1) (335 SE2d 481) (1985).

SUPREME COURT OF THE STATE OF GEORGIA
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Date: June 30, 2009

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Case No. S09C1163

JALANA HUDSON V. THE STATE

COURT OF APPEALS CASE NO. A09A0367

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hunstein, P.J. who dissents.

Therese S. Barnes, Clerk